

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2003-188

May 22, 2003

NEON CONNECT, INC.

Petition for Finding of Public
Convenience and Necessity to
Provide Facilities-Based and Resold
Local Exchange and Dedicated Service

ORDER GRANTING AUTHORITY
TO PROVIDE FACILITIES-BASED AND
RESOLD LOCAL EXCHANGE
SERVICE AND DEDICATED SERVICE
AND APPROVING TERMS AND
CONDITIONS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

In this Order, the Commission grants NEON Connect, Inc. (NEON or Company) the authority to provide: (1) facilities-based competitive local exchange service in specific Verizon-Maine exchanges conditioned upon a showing of facilities readiness to the Commission; (2) resold competitive local exchange service in Verizon-Maine's service area; and (3) local and interexchange dedicated services in the State of Maine. The Commission also approves the Company's Terms and Conditions and Rate Schedules. We also exempt NEON from the requirements of Chapter 210, *Uniform System of Accounts*, and of 35-A M.R.S.A. §§ 707 and 708, subject to the conditions described below.

I. APPROVAL OF APPLICATION TO SERVE

On March 17, 2003, pursuant to 35-A M.R.S.A. §§ 2102 and 2105, NEON filed a petition with the Commission requesting authority to provide facilities-based and resold local exchange telephone service in Maine as well as dedicated service.

Before we grant approval under section 2102 for another public utility to provide service, 35-A M.R.S.A. § 2105 requires us to find that the public convenience and necessity require another utility to provide service in a location where utility is already authorized to provide, or is providing, the same or similar service.

47 U.S.C. § 253(a), enacted by the Telecommunications Act of 1996, states:

(a) In General. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service.

47 U.S.C. § 253(b) states, however:

(b) State Regulatory Authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

We find that granting NEON the authority to provide local exchange and dedicated services in Maine will not impede the preservation or advancement of the public interest goals or policies stated in section 253(b).

NEON's application provides reasonable information indicating that its financial and management capabilities are adequate to provide local services in Maine.

II. SERVICE TERRITORY

A. Facilities-Based Local Service

NEON has requested authority to provide facilities-based local exchange service in the areas served by Verizon-Maine. Facilities-based service includes service provided through the use of unbundled network elements obtained from an incumbent local exchange carriers. At this time NEON is unable to provide proof of facilities readiness. We will grant authority to NEON to provide facilities-based local exchange service within the Verizon exchanges on an exchange by exchange basis upon the condition that, prior to requesting numbering resources for a particular exchange from the North American Numbering Plan Administrator (NANPA), NEON must submit evidence to the Commission for its approval that establishes a readiness to provide facilities based local exchange service within six months in that exchange. If the Commission finds that readiness is established, NEON may then request numbering resources.

If NEON wishes to expand its facilities-based local exchange service area in the future, it must seek such approval pursuant to 35-A M.R.S.A. § 2102, requesting the Commission to amend this Order. Any such request must specify the exchanges where it proposes to offer service and include information establishing a readiness to provide facilities-based local exchange service within six months in the specifically identified areas.

B. Resold Local Service

NEON has also requested authority to provided resold local exchange service throughout the state. NEON states that it will offer service as a reseller of local exchange service provided by other authorized local exchange carriers (LECs). We define local resale as the offering of local exchange service purchased from another competitive local exchange carrier (CLEC) pursuant to 47 U.S.C. § 251(b)(1) or from an incumbent local exchange carrier (ILEC) at a wholesale discount pursuant to 47 U.S.C. § 251(c)(4). The purchase of unbundled network elements from an ILEC and their use in providing local exchange service is facilities-based service and is not resale.

C. Dedicated Services

We are also granting authority to NEON to provide unswitched dedicated services, which may be provided using its own or leased facilities or dedicated services that it purchased from other carriers and resells. Dedicated facilities are capable of carrying both local and interexchange traffic. The grant of authority to provide dedicated unswitched services using facilities owned or controlled by NEON does not constitute authority to provide facilities-based switched local exchange or entitle NEON to request numbering resources from NANPA or the Pooling Administrator.

III. APPROVAL OF TERMS AND CONDITIONS AND RATE SCHEDULES

We allow the terms and conditions proposed by NEON to go into effect. NEON did not use the Commission's standard terms and conditions that comply with Maine law and the Commission's Rules. We have reviewed the Company's terms, conditions and rate schedules, and they appear to comply with Maine law and the Commission's Rules. Nevertheless, if there is any conflict between a provision in NEON's terms and conditions and the Commission's Rules or a statute, the rule or statute will control. Included in the Terms and Conditions is a provision stating that in the event of such a conflict, the statute or the Commission's rule will control.

In general, the Commission believes that a competitive telecommunications market results in services and rates that benefit the public. We believe that the acceptability of NEON's services and rates in the market place provides an adequate test of the reasonableness of the Company's rates. NEON has not provided rates and has stated that the Company is unable to do so at the time of the filing. Prior to providing service in Maine, NEON must provide the Commission with a rate schedule for the Commission's approval.

IV. INTERCONNECTION AGREEMENT(S)

In order to provide local exchange service, a competitive local exchange carrier must, as a practical matter, obtain an interconnection agreement with the ILEC(s) providing service in any area where it intends to provide service. In the absence of such an agreement, it will not be possible for NEON's customers to call customers of the ILEC(s), and vice versa. Interconnection agreements are governed by 47 U.S.C. § 252, and must be approved by this Commission.

If a CLEC makes a bona fide request for an interconnection agreement with an ILEC that is a "rural telephone company" as defined in 47 U.S.C. § 153(37), the "rural exemption" of 47 U.S.C. § 251(f) will apply. All of Maine's independent incumbent local exchange carriers, including Mid-Maine Telecom, are "rural telephone companies." A rural telephone company is not required to negotiate an interconnection agreement or provide interconnection until after the Commission, pursuant to 47 U.S.C. § 251(f)(1)(B), finds that

the requirement “is not unduly economically burdensome, is technically feasible, and is consistent with [the universal service provisions of] section 254”

If NEON executes an interconnect agreement(s) with an ILEC(s), it shall seek approval of that agreement by this Commission.

V. PAYMENT OF ACCESS CHARGES

Our approval of NEON’s application to provide dedicated interexchange service in Maine is conditioned on the payment of access charges to local exchange carriers (LECs) who have on file with the Commission approved access charge rate schedules.

The Commission has granted authority to NEON to provide dedicated interexchange service both as a facilities-based carrier and as a switchless reseller.¹ If NEON provides facilities-based interexchange service, it must pay access charges directly to local exchange carriers. However, switchless resellers do not pay access charges to local exchange carriers. Instead, an underlying facilities-based interexchange carrier pays access charges. NEON states that it presently plans only to provide dedicated services, which may be used for both interexchange and local traffic. If NEON decides in the future to provide resold interexchange services, it shall provide notice to all local exchange carriers from which it obtains access services, as required in the ordering paragraphs, of the identity of its underlying interexchange carrier, which must have authority to provide service in Maine.

VI. WAIVERS; REPORTING REQUIREMENTS

As a condition of providing local exchange service, NEON must comply with the terms of any applicable Commission orders or rules that may govern local interconnection and compensation for interconnection. NEON shall also comply with any applicable Commission Rules or orders that govern universal service, public safety and welfare, service quality and consumer rights.

The Commission grants NEON a waiver from the requirements of Chapter 210 of the Commission’s Rules, which governs telephone utility accounting, and from 35-A M.R.S.A. §§ 707 and 708, which govern reorganizations and affiliated interests. Because NEON’s rates and operations are likely to be subject to market forces, we do not see any present need to subject the Company to those requirements. However, NEON must report its annual intrastate gross operating revenues and its annual intrastate minutes for use for

¹We define switchless resellers as entities which do not own, lease, or control any switching facilities, or private lines, that it will use to provide telecommunication services in Maine. A reseller who owns a switch in another state, and plans to use that switch to switch or carry Maine traffic, is a switched reseller. A reseller who does not own facilities in Maine or any other state, or who owns facilities in another state but does not plan to use that switch to carry Maine traffic, is a switchless reseller.

the purpose of determining its regulatory assessment and such other information requested by the Commission.² If NEON resells service to other switched or switchless telephone service providers, the Company must maintain its records so that it may separately identify those sales.

In addition, NEON shall inform the Commission of any changes to its corporate structure and ownership and of any changes in the name under which it does business, as set forth in Ordering Paragraph No. 3. If necessary, it shall also refile its rate schedules and terms and conditions to reflect its new identity

VII. OTHER REQUIREMENTS

NEON shall comply with all applicable rules of the Commission and statutes of the State of Maine.

VIII. ORDERING PARAGRAPHS

Accordingly, we

1. Grant, pursuant to 35-A M.R.S.A. §§ 2102 and 2105, the request of NEON to provide facilities-based competitive local exchange telephone service and resold local exchange service in Verizon-Maine's service area and dedicated services throughout the State of Maine; and

2. Exempt NEON from the requirements of Chapter 210 of the Commission's Rules, except that it must report the revenue and minutes of use information that is requested by the Commission, on or before April 1 of each year; and

3. Exempt NEON from the approval requirements of 35-A M.R.S.A. §§ 707 and 708, provided that NEON shall notify the Commission of any reorganization, as defined in 35-A M.R.S.A. § 707(1)(A), that results in a merger, sale or transfer of a controlling interest of NEON or of any entity that owns more than 50% of NEON. NEON shall also provide notice of any other changes in the name under which it does business (d/b/a), any change of the location of its business office, and any change of its contact person. NEON shall provide the Administrative Director of the Commission with notice of any of the changes described within 30 days following the change. If necessary, NEON shall amend its rate schedules and terms and conditions to reflect any change in identity.

4. Order that NEON's proposed terms and conditions (pages 1-46), attached to this Order, shall be effective on the date of this Order. NEON will submit rate schedules for approval prior to providing service.

²The Commission mails the annual reporting forms to carriers in January of each year. The completed forms are due by April 1 of each year.

5. Order that NEON, or an underlying facilities-based interexchange carrier authorized to provide interexchange service in Maine, shall pay interexchange access charges as required approved access rate schedules filed by local exchange carriers.

NEON shall notify the Commission of any change in its underlying carrier within 30 days following the change. Any underlying carrier used by NEON shall have the authority to provide intrastate interexchange service in Maine. NEON shall immediately inform the Commission and all local exchange carriers in the State of Maine from which NEON will be purchasing access services if there is any change in its operations that will result in its carrying, switching, or any processing of any of its own traffic, at which time NEON shall begin to pay access charges directly to those local exchange carriers that have approved access charge schedules on file with the Commission; and

6. Order that NEON shall comply with all applicable rules of the Commission, including the requirement of Chapter 280 § 10 that interexchange carriers provide notice to all affected customers of an increase to any rate that is greater than 20%.

Dated at Augusta, Maine, this 22nd day of May, 2003.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch

Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.